

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8454 OF 2004

Paramount Co-op.Housing Society Ltd. ..Petitioners
Vs.

Smt.Sita Rajab Sayani & Ors. . . Respondents

Mr.R.V.Govilkar for the petitioners

Mr.P.K.Dhakephalkar i/b Mr.Niranjan P.Shimpi for
the respondents

CORAM: S.U.KAMDAR, J
DATE : 1ST DECEMBER, 2005

ORAL JUDGMENT:

1. The present petition raises an issue whether under the provisions of Section 154 of the Maharashtra Cooperative Societies Act, 1960 a power can be exercised to entertain a second revision application. Before I deal with the aforesaid issue for the purpose of narration, few facts of the present case are necessary which are briefly enumerated as under:-

2. On 2.12.1978 the petitioners society was incorporated and registered under the Maharashtra

Co-operative Societies Act. One Mr.R.K.Sayani, being the husband of respondent no.1 was the Secretary of the said Society during the period 1978 to 1983. On 27.1.1980 one Mr.Fernandes gave a resignation from the membership of the Society and executed necessary forms for transfer of membership in favour of one Mr.B.F.Malik and the said Mr.B.F.Malik was admitted as a member of the Society.

3. On 14.2.1980 an Annual General Meeting was held and the resignation of Mr.Fernandes was confirmed in the said Annual General Meeting. On 21.8.1987 that is almost after a period of 7 years one Mr.S.S.Zende claiming to be a member of the Society in respect of the said flat issued a notice on the petitioner Society. However, the claim of Mr.Zende is not accepted by anybody and has been consistently rejected, both by the Society and the authorities below.

4. Sometime in or about October 1983, a complaint was filed against Mr.R.K.Sayani for mismanagement of the affairs of the Society and

proceedings were initiated under Section 80 of the Maharashtra Co-op.Societies Act, 1960 for recovery of the documents which were seized by the police under the order passed by the Deputy Registrar, Co-operative Societies. It is the case of the petitioners that on 9.11.1986, the petitioner Society doubted the transaction in favour of the said Mr.Malik and issued public notice in the daily 'Maharashtra Herald', Pune calling for Mr.Malik to produce the documents in respect of his flat. On 11.11.1986 Mr.Malik through his Advocate replied to the said public notice claiming that he is the purchaser of the flat and has paid the amount on 27.6.1981 and 29.6.1982 to Mr.Fernandes for acquiring right title and interest in the said flat. The society thereafter called upon Mr.Malik to produce the documents of title and proof of payment before the committee.

5. It is the case of the petitioners that since Mr.Malik failed to produce registered documents in respect of ownership of the flat, another public notice was given on 4.4.1987 calling upon the interested parties to purchase the said

flat which was put up for sale by the petitioner society. On 26.5.1987 the said Mr.Malik nominated Respondent no.1 in respect of the suit flat.On 1.9.1987 the said Mr.Malik expired. On 19.10.1987 the Advocate of the respondent no.1 addressed a letter to the petitioner society informing about the death of Mr.Malik alongwith photocopy of the Death Certificate and tendered the nomination form by which the respondent no.1 was nominated in respect of the said flat. On 30.9.1988 respondent no.1 forwarded an application seeking membership to the petitioner society on the basis of the said nomination form. On 29.10.1988 petitioners refused the membership to the respondent no.1. Being aggrieved by the said refusal, petitioner preferred an appeal under Section 23 of the Maharashtra Co-op.Societies Act bearing No.61/1988 before the Deputy Registrar, Co-op.Societies, Pune. On 29.4.1989 the petitioners filed a Special Civil Suit No.555 of 1989 against respondent no.1 and her husband interalia claiming vacant and peaceful possession of the flat and decree for damages. On 14.9.1990 respondent no.2 passed an order allowing the said appeal preferred by respondent no.1 and

declared respondent no.1 as nominee of Mr.Malik and directed that she should be added as a member of the petitioner society. Against the said order, petitioner society filed a Revision Application under Section 154 of the Maharashtra Co-op.Societies Act 1960 before the Divisional Joint Registrar, C.S.,Pune and by order dt.21.10.92, the Divisional Joint Registrar dismissed the said revision application and confirmed the order passed by respondent no.2 dt.14.9.1990. In 1993 the petitioners thereafter filed a dispute in the Co-operative Court seeking declaration that respondent no.1 and her husband are in unauthorised and illegal occupation of the said flat.

6. Sometime in or about 1988 a new Managing Committee was constituted and husband of respondent no.1 became the Joint Secretary. However, he was forced to resign from the said Committee. Sometime in or about April 2000, the petitioners filed the Revision Application before the Secretary, Government of Maharashtra, Ministry of Co-operation under section 154 of the Maharashtra

Co-op.Societies Act. The said revision was second revision under the provisions of the said section 154 of the act. By order dt.30.12.00 the Secretary has rejected the second revision as not maintainable as there is no power under section 154 to entertain the second revision against the order of the Registrar.

7. Being aggrieved by the said order, the present petition has been filed inter alia challenging the order passed by the Secretary, Government of Maharashtra holding that the decision of the authority that the second revision is not maintainable is invalid and should be quashed and set aside.

8. Alternatively, the order dt.21.10.92 of the Divisional Joint Registrar is sought to be challenged. In so far as the second revision application is concerned the dispute has been raised that whether under the provisions of section 154 of the Maharashtra Co-op.Societies Act the power of revision can be exercised twice over and against the order passed by the Registrar in

revisional jurisdiction can be once again challenged before the Secretary by invoking the same revisional provision under section 154 of the said act.

9. In so far as the maintainability of second revision is concerned, the learned counsel appearing for the petitioner has contended that in the light of the judgement of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others, reported in (2005) 2 SCC 334 that the second revision is maintainable. It has been contended that the Hon'ble Supreme Court was considering the identical provisions of the Rajasthan Cooperative Societies Act, 1965 which is Section 128 of the said Act and has held that the power conferred on the Joint Registrar and the State Government is concurrent and not alternative and, therefore, a second revisionary power can be exercised under the very same provision of revision under section 128 of the Rajasthan Cooperative Societies Act, 1965. The learned counsel has particularly relied upon paras 13 and 14 of the said judgment to contend that the second

revisionary power can be made applicable. The learned counsel for the petitioner has also contended that in light of the recent judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra) all the earlier judgments of this Court which have taken a consistent view that under Section 154 of the Maharashtra Cooperative Societies Act, a second revision is not available and the power of second revision cannot be exercised by the State Government are impliedly overruled and thus cannot be considered. The respondent society on the other hand has brought to my attention the judgments of the learned Single Judges of this Court, particularly the unreported judgment of Lodha, J. in W.P. No. 4180 of 1998 dated 18.2.1999, the judgment in the case of Bhupendra Villa Premises Co-operative Society Ltd., and another vs. Chandrakant G. Shah and others, reported in 2001 (2) Mh.L. J. 834. a judgment of another learned Single Judge in the case of Shri Ramesh T. Gopalani vs. The Janata Sahakari Bank Ltd., and another, reported in 2000 (3) Bom. C. R. 474, a judgment of another learned Single Judge in the

case of Virendra Bhanji Rathod and others vs. Anand Vihar Co-operative Housing Society Ltd., Mumbai and others, reported in 2004 (1) Mh.L.J. 656 and lastly the judgment of another learned Single Judge in the case of Dadar Avanti Co-operative Housing Society Ltd., vs. State of Maharashtra & Ors., reported in 2005 (2) Bom. C.R. 604. Each of the aforesaid judgment have taken a consistent view that the power of revision under Section 154 of the Maharashtra Cooperative Societies Act, 1960 cannot be exercised twice over and once the power having been exercised by the Registrar or the Secretary, the said power is exhausted and revision against the order of Registrar in exercise of revisionary power under Section 154 is not maintainable before the Secretary and/or Minister of Co-operation of the State of Maharashtra under very same provision of law. The view has been consistently taken that the power of revision can only be exercised once and cannot be exercised twice over under section 154 of the Act. However, the larned counsel for the petitioner has vehemently contended that the aforesaid views are all impliedly overruled by the

recent judgment of the Apex Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra). I have considered the judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra). Firstly, in my opinion the said judgment has no application because the provisions of Section 128 of the Rajasthan Cooperative Societies Act, 1965 is in para materia different to the provisions of the present case. The power under section 128 is simultaneously conferred on the Government and the Registrar because the opening words of the provisions of Section 128 reads as under :-

"The State Government and the Registrar may call for and examine the record of any enquiry or proceedings of any other matter."

In contrast to the same, the provisions of section 154 does not give a concurrent jurisdiction to the Registrar and the State Government because the words prescribed thereunder are "the State Government or the Registrar may call for and

examine the records." The wording in that section by substitution of the word "or" in place of "and" is materially significant because in case where the word "and" is used is a coinjoint power conferred both on the Registrar as well as the Government whereas the word "or" indicates that it is the power conferred on 'either' or 'on' in such cases the power cannot be exercised by both but it can be exercised by one of the two and in that view of the matter, I am not inclined to accept the contention that by virtue of the judgment of the Apex Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra) all the learned Single Judges judgments of this Court interpreting the very section 154 are deemed to be impliedly overruled. Thus, the contention that the order passed by the Secretary holding that the second revision is not maintainable is bad in law is rejected. The order passed by the Secretary holding that the second revision is not maintainable is upheld.

10. Now turning to the merits of the case, I am of the opinion that the present petition ought to be dismissed merely and simply on the ground of

delay. Originally, the main order challenged herein is of 21.10.92. Even against the said order the second revision was filed only in 2000. The explanation of delay given by the petitioner society is that the husband of respondent no.1 was holding the post of Joint Secretary. This explanation for delay is not acceptable. Firstly, because the husband of respondent no.1 was a Joint Secretary for a short period of 15 months and thus, it does not explain any delay of almost 8 years in filing Revisional Application and almost another 4 years in filing the present petition from the date of the order in 2nd revision application. Thus, there is a delay of 12 years from the date of challenging the impugned order dt.21.10.92 on merits. In my opinion, the delay and latches itself disentitles the petitioners from challenging the said order. However, even otherwise on merits I find that the conduct on the part of the petitioner society is totally malafide. It is not in dispute that the flat originally belonged to one Mr.Fernandes and the said Mr.Fernandes was a member of the society. The said original member has resigned and a new member Mr.Malik applied for

membership. It is also not disputed that the said Mr.Malik was made a member of the Society as far back as 1980 and thereafter the Annual General Meeting has approved the said membership on 14.2.80. However, the learned counsel for the petitioners has urged before me that both these resolutions are illegal and are fabricated and false. It has been contended that during the period 1978 to 1983 husband of respondent no.1 who was related to Mr.Malik was in charge of the Society and he has manipulated the record by implanting the said resolutions which are false. It has been contended that infact the said Mr.Malik was never made a member of the Society because he did not produce the documents of title indicating the sale of the flat by Mr.Fernandes in his favour. It has been contended that the said Mr.Malik was required to produce the registered sale deed in respect of the said flat in his favour from Mr.Fernandes and in view of the failure to produce the same inspite of the public notice issued in the daily 'Maharashtra Herald', still the petitioners did not comply with the requisition of producing the said document and therefore he is not entitled

to the membership of the said flat.

11. It has been alternatively contended that assuming that his membership was valid but still the respondent no.1 is not entitled to be a member because the right which has been claimed by respondent no.1 is by way of nomination from the said deceased Mr.Malik and the nomination form which is supposed to have been executed by Mr.Malik prior to his death on 26.5.87 is not a valid nomination form because it was never tendered to the society in accordance with the Rule 25(1) of the Maharashtra Co-op.Societies Act which requires the nomination form to be signed and to be tendered in the office of the Society for being valid nomination. It has been contended by the petitioners that the respondent no.1 is not entitled to be a member and infact it is the petitioner society who is entitled to forfeit the said flat to itself and evict the respondent no.1 from the said premises. It has been also contended that the suit for eviction has been filed as far back as 1989 being Special Civil Suit No.555 of 1989 and for recovery of possession and thereafter

the respondent ought not to be a member of the said society. In my opinion, each of the aforesaid arguments raised are totally baseless and without any merits. I also find that the conduct on the part of the petitioner society of claiming forfeiture of flat and confiscation of the same to itself is not a sound proposition of law and cannot be accepted.

12. In so far as the contention of the petitioners is concerned pertaining to the membership of Mr.Malik I find that the contentions raised are without any basis. After passing of the resolution by the Managing Committee on 27.1.80 and the same being approved by the General Body on 14.2.80, for a period of 6 years the society did not take any action. The advertisement was published for the first time only in 9.11.86 and in fact the advertisement was replied through the Advocates notice by Mr.Malik saying that he has purchased the flat and given details of the payments made. The only issue is that he failed to produce the registered documents. In my opinion, in so far as the membership is concerned it is

undoubtedly correct that the person holding the interest in the property can only become a member and not any stranger. But in a case where earlier holder of the property admits that he has transferred the said premises to new person, resigns from the membership and executes all necessary documents in favour of new incumbent to be a member of the society then in such cases it is not open for the petitioner society to challenge the validity or otherwise of the sale transaction in favour of the new incoming members because the society is not concerned with the validity or otherwise of the transaction in favour of the new incoming members. In so far as the original holder of the flat is concerned, he is not disputing the transfer of right, title and interest in favour of the said Mr.Malik. The so called claim put up by Mr.S.S.Zende in 1987 is rejected by everybody and even the learned counsel for the petitioners before me fairly conceded that the said claim has no basis and has to be ignored because he never pursued his claim at all before the authority or the Society. Thus, in the aforesaid circumstances, I am of the opinion, that the contention raised by the

petitioner for challenging the membership of Mr.Malik as far back as 1980 is without any merits and baseless.

13. Now turning to the second contention that the nomination in favour of the respondent is illegal and invalid because the said nomination is not filed with the society by a member during his life time. The nomination form has been admittedly signed by Mr.Malik during his life time on 26.5.87. Merely because it remained to be tendered to the Co-operative Society, would not make such a nomination form invalid in law. Apart therefrom the nomination of the respondents has not been questioned by any of the legal heirs of the said Mr.Malik and thus, the contention on the part of the petitioners that the nomination is invalid and thus respondent no.1 is not entitled to become a member of the society ought to be rejected.

14. In my opinion, the contention that the nomination is not tendered though executed by the deceased member and consequently the same should not be accepted is to take a very technical

approach by relying upon Rule 25(1) of the said Maharashtra Co-op.Society Rules. In any event, the right of the respondent no.1 to become member of the society by intestate succession has not been challenged by any other legal heirs of the said deceased member. In my view, in absence of any dispute by the legal heirs to accept the contention of the learned counsel for the petitioners that by non-deposit of nomination form with the office of the society the said nomination is invalid and therefore membership of respondent no.1 should be refused cannot be accepted. In any event, I am of the opinion that the petitioners were not recognising the deceased Mr.Mallik as a member and thus, question of accepting nomination of respondent no.1 would never have arose. Thus, I find that the action on the part of the petitioner in not granting membership is not in consonance with the principle of open membership under s.22 and s.23 of the Maharashtra Co-operative Societies Act, 1960.

15. This takes me to one more contention which has been advanced by the learned counsel for the

petitioners that the petitioners being owner of the property is entitled to forfeit the flat after evicting Mr.Malik during his life time and now on his death by removing respondent no.1 from the said flat premises and the petitioners without paying any amount is entitled to confiscation of the said flat and usurp the property to itself. The contention raised on the face of it is preposterous. To accept such a contention would amount to hold that the right of individual in any property can be confiscated by the society in the aforesaid manner. Even if the society is a owner of the property in a larger sense because it is the society of all members, it does not have right or power to take away the flat of any particular member to itself. In my opinion the contention of the learned counsel for the petitioners of the aforesaid nature must be outrightly rejected and cannot be accepted. Apart from the fact I find essentially the dispute in the present case is more of internal fight in the society rather than a real legal fight on serious issues in the present case. The fact indicates that from time and again as and when the managing committee has changed the issue

as to the membership of Mr.Malik who has since expired has been raised. This is indicative of the fact that from 1980 to 1986 Mr.Malik's membership was accepted and nothing happened. Thereafter proceedings were conducted upto 1992 and thereafter no proceedings were initiated challenging the order of 1992 right up to 2000 which is another period of 8 years. The contention that during 1980 to 1986 no steps were taken because husband of respondent no.1 was in management and / or was holding over the record of the society has to be rejected because the society even during that period of time did not run by one member. Apart therefrom, admittedly in October 1983, the petitioner has received the record through the help of the Police from the husband of respondent no.1. Still no action was taken on the membership of the said deceased Mr.Malik till 1986. In that view of the matter, I find that the action on the part of the petitioner society in the present case is totally malafide and devoid of any merits.

16. In the aforesaid circumstances, I do not

find it appropriate to interfere with the concurrent finding of facts given by both the authorities below in writ jurisdiction under Article 227 of the Constitution of India. In the light of the aforesaid petition fails and dismissed with cost.